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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 ELISSA RUBENSTEIN, ) Case No. CV 13-9549-JLS (KK)  
12 Plaintiff, )  
13 v. ) FINAL REPORT &  
14 WHITTIER POLICE ) RECOMMENDATION OF UNITED  
DEPARTMENT, et al., ) STATES MAGISTRATE JUDGE  
15 Defendants. )  
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17 This Final Report and Recommendation is submitted to the Honorable  
18 Josephine L. Staton, United States District Judge, pursuant to Title 28 of the  
19 United States Code, section 636 and General Order 194 of the United States  
20 District Court for the Central District of California.

21 I.

22 **INTRODUCTION**

23 Plaintiff Elissa Rubenstein (“Plaintiff”), who is at liberty and has been  
24 granted leave to proceed in forma pauperis, filed a pro se Fifth Amended  
25 Complaint pursuant to Title 42 of the United States Code, section 1983 (“Section  
26 1983”). Plaintiff sues defendants Whittier Police Department Officers Nyberg,  
27 Plank, Bolanos, Karson, Jensen, Cheng, and Esquivel (“Defendants”) for alleged  
28 Fourth Amendment violations arising out of a search and seizure that occurred on

1 February 4, 2009. Defendants have now filed a Motion for Summary Judgment,  
2 arguing Plaintiff's action is untimely. For the reasons discussed below, the Court  
3 recommends **GRANTING** the Motion for Summary Judgment.

## 4 **II.**

### 5 **ALLEGATIONS OF THE FIFTH AMENDED COMPLAINT**

6 According to the Fifth Amended Complaint ("FAC"), on the afternoon of  
7 February 4, 2009, Plaintiff sustained injuries after driving her vehicle into a parked  
8 car. ECF Docket No. ("Dkt.") 26, FAC at 12-13, 18; see also Dkt. 66-1, Decl.  
9 Carmen Vasquez & Exs. Supp. Mot. Summ. J. at 46. Suffering from "severe  
10 bleeding," Plaintiff left the accident scene and drove to her home. Dkt. 26 at 12;  
11 see also Dkt. 66-1 at 46.

12 Approximately twenty minutes after the accident, Defendants barged into  
13 Plaintiff's home without knocking or requesting Plaintiff's consent to enter. Dkt.  
14 26 at 12-13. Defendants lacked a warrant and probable cause. Id. Believing  
15 Plaintiff to have been driving under the influence of alcohol, Defendants confined  
16 Plaintiff to a chair and interrogated her. Id. at 12-14. Throughout the  
17 interrogation, Plaintiff remained compliant, asserted she was not intoxicated, and  
18 admitted she regretted leaving the accident scene. Id. at 13. Despite Plaintiff's  
19 statements, Defendants interrogated her for about two hours, although they did not  
20 administer a standard drunk driving test. Id. at 12, 14. Further, believing Plaintiff  
21 to be engaged in illegal drug use, Defendants searched Plaintiff's desk drawers,  
22 bathroom medicine cabinet, and handbag. Id. at 12-13. Upon finding Plaintiff's  
23 prescription medications, Defendants accusingly asked Plaintiff the purpose of  
24 each prescribed medication. Id. at 13.

25 At some point during these events, Plaintiff's fiancé's mother checked on  
26 Plaintiff and requested that Defendants leave, but Defendants disregarded her  
27 request. Id. at 15. An ambulance subsequently transported Plaintiff to a hospital  
28 and Defendants questioned her again before doctors and nurses treated her for

1 physical injuries arising from the accident. Id.

2 Plaintiff claims “[t]he actions of all seven Defendants . . . led to a downward  
3 spiral for Plaintiff,” and Defendants caused her emotional and mental instability.  
4 Id. at 17. Plaintiff further claims she “suffered psychosis on a number of occasions  
5 following Defendants’ injurious treatment of her,” and had to visit several  
6 hospitals and psychiatric institutions. Id. at 18, 20, 22.

### 7 **III.**

#### 8 **PROCEDURAL AND FACTUAL HISTORY**

9 On December 30, 2013, over four and a half years after the alleged incident,  
10 Plaintiff filed the instant action. Dkt. 1, Compl. Plaintiff ultimately filed the FAC<sup>1</sup>  
11 which was ordered served on Defendants. See Dkt. 24, Order Directing Service of  
12 Process.

13 On January 6, 2015, Defendants filed a Motion to Dismiss the FAC as  
14 untimely and for failure to state a claim. Dkt. 39, Mot. Dismiss FAC. Following  
15 briefing, and after receiving objections from Plaintiff alleging her mental  
16 impairments entitled her to tolling, the Court denied the Motion to Dismiss without  
17 prejudice. Dkt. 53, Order Denying Mot. Dismiss FAC.

18 After conducting discovery, Defendants filed the instant Motion for  
19 Summary Judgment (“Motion”). Dkt. 66, Mot. Defendants renew their request to  
20 dismiss the FAC as untimely. Id. Defendants present new and undisputed facts  
21 regarding Plaintiff’s conduct after the February 4, 2009 incident to demonstrate  
22 Plaintiff’s alleged mental impairments do not entitle her to tolling.

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24 <sup>1</sup> Plaintiff’s original Complaint, First Amended Complaint, Second Amended  
25 Complaint, Third Amended Complaint, and Fourth Amended Complaint were each  
26 screened pursuant to Title 28 of the United States Code, section 1915(e)(2)(B), and  
27 dismissed with leave to amend. See Dkt. 8, Order Dismissing Compl.; Dkt. 11,  
28 Order Dismissing First Am. Compl.; Dkt. 14, Order Dismissing Second Am.  
Compl.; Dkt. 20, Order Dismissing Third Am. Compl.; Dkt. 23, Order Dismissing  
Fourth Am. Compl.

1       Following the February 4, 2009 incident with Defendants (“incident”),  
 2 Plaintiff volunteered at Presbyterian Intercommunity Hospital (“PIH”). Dkt. 67,  
 3 Statement of Uncontroverted Facts (“SUF”), ¶ 10;<sup>2</sup> see Dkt. 66-1 at 31. Plaintiff  
 4 had passed PIH’s background test and began PIH’s volunteer training program  
 5 shortly before the incident. Dkt. 66-1 at 42. After the incident, Plaintiff continued  
 6 to volunteer at PIH’s neonatal and surgery waiting desks. Id. at 31. In mid-2009,  
 7 Plaintiff felt “[v]ery well” and “enjoyed the work,” so she increased her volunteer  
 8 hours to eight hours a week. Id. at 44-45. By the end of 2009, Plaintiff had  
 9 volunteered approximately 400 hours at PIH. Id. at 32.

10       Other than initial treatment on the date of the incident, Plaintiff admits she  
 11 did not “seek medical treatment as a result of the incident . . . until February 17,  
 12 2010.” Id. at 49-50. Specifically, Plaintiff had not received any mental health  
 13 treatment, nor had she been committed to any mental health facility. Id. at 32, 49-  
 14 50. On February 17, 2010, over one year after the incident, Plaintiff was admitted  
 15 to a mental health facility and released on February 26, 2010. SUF ¶ 16.

16       In September 2010, Plaintiff started a three-month course for a nursing  
 17 assistant certificate at a career college. Id. ¶¶ 14-15; Dkt. 66-1 at 33-34. Plaintiff  
 18 continued the course until its completion in December 2010. SUF ¶ 14; Dkt. 66-1  
 19 at 36. In December 2010, Plaintiff took written and clinical California license tests  
 20 for a nursing assistant certificate. SUF ¶ 15; Dkt. 66-1 at 36. Plaintiff successfully  
 21 passed both tests on her first attempt. Id.

22       Plaintiff does not dispute the facts presented in support of the Motion, but  
 23 argues her action did not accrue until 2013 because she “had not experienced the  
 24 full brea[d]th of [her] injury and pain and suffering and had only then emerged  
 25 from many lengthy stays at mental health facilities.” Dkt. 72, Opp’n at 4-7.

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27       <sup>2</sup> Unless otherwise noted, cited evidence is undisputed. The parties make no  
 28 objections or if the parties object, the Court overrules those objections.

1 On January 25, 2016, the Court issued its original Report and  
 2 Recommendation (“R & R”) recommending Plaintiff’s action be dismissed as  
 3 untimely. Dkt. 74, R & R. On February 3, 2016, Plaintiff filed Objections to the  
 4 R & R (“Objections”). Dkt. 75, Objs. The Court herein issues this Final Report  
 5 and Recommendation, addressing Plaintiff’s Objections in footnote 4 and section  
 6 V.C.2.

#### 7 IV.

#### 8 LEGAL STANDARD

9 Federal Rule of Civil Procedure 56 permits summary judgment if the  
 10 moving party demonstrates the absence of a genuine issue of material fact and  
 11 entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317,  
 12 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A factual dispute is “material” if it  
 13 might affect the outcome of the suit under governing law. Anderson v. Liberty  
 14 Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

15 An affidavit or declaration may be used to support or oppose a motion for  
 16 summary judgment, provided it is “made on personal knowledge, set[s] out facts  
 17 that would be admissible in evidence, and show[s] that the affiant or declarant is  
 18 competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4). When ruling  
 19 on a motion for summary judgment, the district court must view all inferences  
 20 drawn from the underlying facts in the light most favorable to the nonmoving  
 21 party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106  
 22 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Summary judgment is therefore not  
 23 appropriate “where contradictory inferences may reasonably be drawn from  
 24 undisputed evidentiary facts.” Hollingsworth Solderless Terminal Co. v. Turley,  
 25 622 F.2d 1324, 1335 (9th Cir. 1980). Further, the Court must not make credibility  
 26 determinations with respect to the evidence offered. See T.W. Elec. Serv., Inc. v.  
 27 Pac. Elec. Contractors Ass’n, 809 F.2d 626, 630-31 (9th Cir. 1987) (citing  
 28 Matsushita, 475 U.S. at 587).

Moreover, pursuant to Central District of California Local Rule 56-3, the Court assumes the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy.<sup>3</sup>

## V.

### DISCUSSION

#### A. PLAINTIFF'S ACTION IS UNTIMELY, ABSENT TOLLING.

##### (1) Applicable Law

"Federal law determines when a civil rights claim accrues." Maldonado v. Harris, 370 F.3d 945, 955 (9th Cir. 2004) (citing Knox v. Davis, 260 F.3d 1009, 1013 (9th Cir. 2001)). Under federal law, a Section 1983 claim challenging the validity of a search and seizure accrues on the date of the search and seizure. Matthews v. Macanas, 990 F.2d 467, 469 (9th Cir. 1993).

State law determines the applicable statute of limitations. Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004). Plaintiff has filed a civil rights complaint pursuant to Section 1983. Hence, the applicable statute of limitations is California's statute of limitations for personal injury actions. Id. California's statute of limitations for personal injury actions is set forth in California Code of Civil Procedure section 335.1 ("Section 335.1"), which states a personal injury action must be filed within two years after the action accrued. Cal. Civ. Proc. Code § 335.1.

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<sup>3</sup> "In determining any motion for summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." C.D. Cal. L.R. 56-3. However, Plaintiff filed neither a Statement of Genuine Disputes, nor a declaration or other written evidence with her Opposition to the Motion. See Dkt. 72.

1           **(2) Analysis**

2           Here, because Plaintiff challenges the validity of an alleged February 4,  
3 2009 search and seizure, her action accrued on February 4, 2009, and expired two  
4 years later on February 4, 2011. See Matthews, 990 F.2d at 469; Cal. Civ. Proc.  
5 Code § 335.1; Jones, 393 F.3d at 927.

6           Plaintiff's claim that she is entitled to an accrual date sometime in 2013  
7 because she "could not begin to process earlier than the year 2013 because [she]  
8 had not experienced the full brea[d]th of [her] injury and pain and suffering and  
9 had only then emerged from many lengthy stays at mental health facilities" is  
10 meritless. Dkt. 72 at 4-7. First, Plaintiff's claim she did not appreciate the scope  
11 of her injuries until a later date does not warrant a later accrual date because federal  
12 law clearly states an action challenging the validity of a search and seizure accrues  
13 on the date of the search and seizure. See Matthews, 990 F.2d at 469. Second,  
14 Plaintiff admits she did not receive any mental health treatment for injuries  
15 allegedly arising from the incident until February 17, 2010, which undermines her  
16 unsupported claim that mental injuries precluded her from timely discovering and  
17 filing her action. See Dkt. 66-1 at 49-50. Finally, on October 28, 2011, Plaintiff  
18 filed an administrative claim against the City of Whittier relating to damages  
19 allegedly arising from the incident, Dkt. 26 at 3, which further refutes any  
20 contention she is entitled to a 2013 accrual date.

21           Accordingly, because Plaintiff did not lodge her original Complaint until  
22 December 30, 2013, over two years and ten months (i.e. 1,060 days) after the  
23 statute of limitations expired, it is barred by Section 335.1 absent tolling. See Dkt.  
24 3, Compl. at 1.

25 **B. STATUTORY TOLLING FOR "INSANITY" FAILS TO RENDER**  
26 **THIS ACTION TIMELY.**

27           **(1) Applicable Law**

28           For actions under Section 1983, federal "courts apply the forum state's . . .



1 law regarding tolling except to the extent any of these laws is inconsistent with  
 2 federal law.” Jones, 393 F.3d at 927. Under California law, tolling for “insanity”  
 3 is provided “[i]f a person . . . is, at the time the cause of action accrued . . . lacking  
 4 the legal capacity to make decisions.” Cal. Civ. Proc. Code § 352(a) (“Section  
 5 352(a)”). A plaintiff seeking Section 352(a) tolling bears the burden of  
 6 establishing such tolling applies. Hinton v. Pac. Enterprises, 5 F.3d 391, 395 (9th  
 7 Cir. 1993) (stating “[t]he burden of alleging facts which would give rise to tolling  
 8 falls upon the plaintiff”).

9 A plaintiff is entitled to Section 352(a) tolling for “insanity” only if she  
 10 shows she was continuously “incapable of caring for [her] property or transacting  
 11 business or understanding the nature or effects of [her] acts” at the time her cause  
 12 of action accrued. Pearl v. Pearl, 177 P. 845, 846 (Cal. 1918); Cal. Civ. Proc. Code  
 13 § 357 (stating “[n]o person can avail h[er]self of a disability, unless it existed when  
 14 h[er] right of action accrued”); see Alcott Rehab. Hosp. v. Superior Court, 112 Cal.  
 15 Rptr. 2d 807, 812 (Cal. Ct. App. 2001); Weinstock v. Eissler, 36 Cal. Rptr. 537,  
 16 549 (Cal. Ct. App. 1964). The fact a plaintiff has suffered from mental  
 17 impairments is insufficient alone to show insanity for Section 352(a) tolling.  
 18 Snyder v. Boy Scouts of Am., Inc., 253 Cal. Rptr. 156, 159 (Cal. Ct. App. 1988)  
 19 (stating plaintiff’s “‘post-traumatic syndrome’ does not constitute insanity under  
 20 the statute”). Even a finding that a plaintiff was “mentally ill” and had been  
 21 committed to a mental health facility are insufficient alone to show insanity for  
 22 Section 352(a) tolling. Hsu v. Mt. Zion Hosp., 66 Cal. Rptr. 659, 664 (Cal. Ct.  
 23 App. 1968).

## 24 (2) Analysis

25 Here, Plaintiff fails to show she was continuously insane from the time her  
 26 cause of action accrued for Section 352(a) tolling. Plaintiff has presented no  
 27 evidence to establish she was continuously “incapable of caring for [her] property  
 28 or transacting business or understanding the nature or effects of [her] acts” at the



1 time her cause of action accrued. See Pearl, 177 P. at 846; Cal. Civ. Proc. Code §  
2 357.

3 To the contrary, undisputed facts establish Plaintiff cared for her property,  
4 transacted business, and understood the nature or effects of her acts at the time her  
5 cause of action accrued. It is undisputed Plaintiff volunteered at PIH's neonatal  
6 and surgery waiting desks promptly after the February 4, 2009 incident. SUF ¶ 10;  
7 see Dkt. 66-1 at 31. In mid-2009, Plaintiff felt "[v]ery well" and "enjoyed the  
8 work," so she increased her volunteer hours. Dkt. 66-1 at 44-45. By the end of  
9 2009, Plaintiff had volunteered approximately 400 hours at PIH and was not  
10 committed to any mental health facilities. Id. at 32.

11 From September 2010 to December 2010, Plaintiff attended a three-month  
12 course for a nursing assistant certificate at a career college. SUF ¶¶ 14-15; Dkt.  
13 66-1 at 33-34, 36. In December 2010, Plaintiff took written and clinical California  
14 license tests for a nursing assistant certificate, and passed both tests on her first  
15 attempt. SUF ¶ 15; Dkt. 66-1 at 36. Thus, Plaintiff's activities after Defendants'  
16 alleged misconduct -- including her volunteer work, career college studies, and  
17 obtaining a nursing assistant certificate -- refute any claim Plaintiff was  
18 continuously insane from the time the cause of action accrued. See Cal. Civ. Proc.  
19 Code § 352(a); Alcott Rehab. Hosp., 112 Cal. Rptr. 2d at 812.

20 Plaintiff's Opposition fails to establish a genuine issue of material fact  
21 regarding whether she qualifies for Section 352(a) tolling. See Dkt. 72. To the  
22 extent Plaintiff contends her mental health issues demonstrate insanity under  
23 Section 352(a), her claim fails because mental impairments alone are insufficient.  
24 See Snyder, 253 Cal. Rptr. at 159.

25 Further, although Plaintiff was admitted to a mental health facility from  
26 February 17, 2010 to February 26, 2010, SUF ¶ 16, this brief hospitalization fails  
27 to show insanity for Section 352(a) tolling. See Hsu, 66 Cal. Rptr. at 664.  
28 Similarly, although Plaintiff provides medical records showing she was

1 intermittently treated and hospitalized for mental health issues from April 20, 2008  
 2 to December 23, 2012, Dkt. 75 at 22-85; see Dkt. 51, Certification of Elissa  
 3 Rubenstein at 40-68, 75-112, 119-24, 142-69,<sup>4</sup> such treatment fails to show  
 4 Plaintiff was continuously insane from February 4, 2009 to December 30, 2013.  
 5 See Hsu, 66 Cal. Rptr. at 664.

6 Accordingly, Plaintiff has not met her burden of establishing entitlement to  
 7 statutory tolling under Section 352(a).

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 12 <sup>4</sup> The medical records submitted by Plaintiff in a March 3, 2015 filing show  
 13 mental health treatment for the following twelve periods:

- 14 (1) March 1, 2010 to March 5, 2010, Dkt. 51 at 70-71;
- 15 (2) October 12, 2010, id. at 119-24;
- 16 (3) November 3, 2010 to November 16, 2010, id. at 66-68;
- 17 (4) March 1, 2011 to March 7, 2011, id. at 63-65;
- 18 (5) May 20, 2011 to May 30, 2011, id. at 60-62;
- 19 (6) June 25, 2011 to July 5, 2011, id. at 57-59;
- 20 (7) August 27, 2011 to September 14, 2011, id. at 93-112;
- 21 (8) January 28, 2012 to March 2, 2012, id. at 75-92;
- 22 (9) July 20, 2012 to July 22, 2012, id. at 142-57;
- 23 (10) August 6, 2012 to August 13, 2012, id. at 50-56;
- 24 (11) November 20, 2012 to November 27, 2012, id. at 40-49; and
- 25 (12) December 21, 2012 to December 23, 2012, id. at 158-69.

26 Although Plaintiff failed to include these records in her Opposition, she has  
 27 now submitted them as part of her Objections. Dkt. 75. The Court, however, had  
 28 already considered the medical records in the original Report and Recommendation  
 due to Plaintiff's pro se status. Cf. Karim-Panahi v. Los Angeles Police Dep't, 839  
 F.2d 621, 623 (9th Cir. 1988) (stating "[i]n civil rights cases where the plaintiff  
 appears pro se, the court must construe the pleadings liberally and must afford  
 plaintiff the benefit of any doubt"). Thus, the Court's analysis of this issue  
 remains unchanged.

**C. EQUITABLE TOLLING FAILS TO RENDER THIS ACTION  
TIMELY.**

**(1) Applicable Law**

“As a general matter, equitable tolling pauses the running of, or ‘tolls,’ a statute of limitations when a litigant has pursued h[er] rights diligently but some extraordinary circumstance prevent[ed] h[er] from bringing a timely action.” Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1231-32, 188 L. Ed. 2d 200 (2014) (emphasis added). Where a plaintiff filed an administrative claim for an alleged wrongdoing and later files a lawsuit for the same wrongdoing, the plaintiff may claim equitable tolling for the period in which her administrative claim remained pending. Collier v. City of Pasadena, 191 Cal. Rptr. 681, 685 (Cal. Ct. App. 1983). A plaintiff claiming entitlement to equitable tolling for the time she pursued administrative remedies, or for any other reason, must show: (1) timely notice to the defendants; (2) lack of prejudice to the defendants; and (3) reasonable and good faith conduct on the part of the plaintiff. Id.; Addison v. State of California, 578 P.2d 941, 943-44 (Cal. 1978).

With respect to the notice requirement, “the filing of the first claim must alert the defendant[s] in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant[s] in the first claim [are] the same one[s] being sued in the second.” Collier, 191 Cal. Rptr. 681, 685. Courts have permitted exceptions to this general rule, and allowed equitable tolling in limited circumstances where the first action put the defendants in the second action on notice of “the need to begin to investigate facts that form the basis of the second claim.” Hopkins, 170 Cal. Rptr. 3d at 563 (individual defendant business owners received timely notice when plaintiff filed a prior workers’ compensation claim against defendants’ business); Collier, 191 Cal. Rptr. at 685 (defendant had timely notice where plaintiff previously filed an administrative claim with a pension plan administrator because

1 defendant controlled the pension plan administrator).

2 **(2) Analysis**

3 In her Objections, Plaintiff argues entitlement to equitable tolling for the  
4 period in which her administrative claim against the City of Whittier (“City”) was  
5 pending. Dkt. 75 at 7-8; see Dkt. 26 at 3-5. However, Plaintiff fails to establish  
6 (1) timely notice to Defendants; (2) lack of prejudice to Defendants; and (3)  
7 reasonable and good faith conduct on the part of the Plaintiff. Addison, 578 P.2d  
8 at 943-44.

9 First, Plaintiff presents no evidence showing the individual Defendants in  
10 this case had timely notice of Plaintiff’s administrative claim against the City. See  
11 Dkt. 26 at 3-5; Collier, 191 Cal. Rptr. 681, 685. The administrative claim named  
12 only the City, not the individual Defendants in the instant action. Dkt. 26 at 3-5.  
13 In fact, the administrative claim form provided a space for Plaintiff to state the  
14 name of the individual officers who allegedly committed wrongdoing, but Plaintiff  
15 left the space blank. See id. at 3. Plaintiff, thus, fails to demonstrate her  
16 administrative claim put Defendants on notice of “the need to begin to investigate  
17 facts.” See Hopkins, 170 Cal. Rptr. 3d at 563.

18 Second, Plaintiff has not established Defendants would not be prejudiced  
19 from having to defend against the action filed nearly five years after the February  
20 4, 2009 incident and from having to rely on “deteriorated evidence.” See  
21 Structural Steel Fabricators, Inc. v. City of Orange, 46 Cal. Rptr. 2d 867, 870 (Cal.  
22 Ct. App. 1995) (citation omitted).

23 Finally, Plaintiff fails to establish reasonable and good faith conduct on her  
24 part. In addition, Plaintiff fails to establish how long the administrative claim was  
25 pending. Therefore, even assuming equitable tolling applied, Plaintiff fails to meet  
26 her burden of showing the claim was pending for the 1,060 days necessary to  
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1 render her action timely.<sup>5</sup>

2 Accordingly, Plaintiff has not met her burden of establishing entitlement to  
3 equitable tolling.

4 **VI.**

5 **RECOMMENDATION**

6 It is, therefore, recommended the Court issue an order: (1) accepting and  
7 adopting this Final Report and Recommendation; (2) granting Defendants' Motion  
8 for Summary Judgment; and (3) dismissing Plaintiff's action with prejudice.

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10 DATED: FEBRUARY 10, 2016

  
HONORABLE KENLY KIYA KATO  
UNITED STATES MAGISTRATE JUDGE

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23 <sup>5</sup> Plaintiff has not argued entitlement to equitable tolling based on her mental  
24 health issues. The Court nevertheless notes Plaintiff's mental health issues are  
25 insufficient to warrant equitable tolling due to Plaintiff's inability to demonstrate  
26 timely notice and lack of prejudice to the Defendants, and reasonable and good  
27 faith conduct on the part of the Plaintiff. See Addison, 578 P.2d at 943-44.  
28 Moreover, assuming arguendo equitable tolling for the 123 days in which Plaintiff  
received psychiatric treatment and hospitalizations, Plaintiff's action -- which is  
untimely by 1,060 days -- would remain time-barred.